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No. \_\_\_\_\_  
Court of Appeals No. 34326-6-II

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LERON FORD,

Petitioner.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,  
and the Superior Court of Pierce County

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A. IDENTITY OF PETITIONER

Petitioner Leron Ford, appellant below, asks this Court to grant review of the decision of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1) and (4), petitioner seeks review of the unpublished decision of the court of appeals, Division Two, in State v. Ford (No. 34326-6-II), filed July 25, 2007 (hereinafter “Opinion”) (2007 Wash. App. LEXIS 2133).<sup>1</sup> With that opinion, Division Two affirmed Ford’s convictions for intentional second-degree murder and first-degree manslaughter.

C. ISSUES PRESENTED FOR REVIEW

Nearly 20 years after petitioner was convicted of felony murder, that conviction was set aside pursuant to In re Andress, 147 Wn.2d 602, 616, 56 P.3d 981 (2002). Over defense objection, the prosecution was then allowed to amend the information to add a new charge of intentional second-degree murder nearly twenty years after the original conviction. The court permitted the new charge to be filed despite the mandates of CrR 4.3.1(b)(3), the “mandatory joinder” rule, based on an “ends of

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<sup>1</sup>A copy of the Opinion is attached as Appendix A.

justice” exception to the rule.

1. In State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982), this Court held that, regardless whether an initial charge was dismissed as legally improper, the prosecution was precluded by the mandatory joinder rule from adding a new “related” charge on remand. In addition, in State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984), this Court held that the motive for successive prosecutions in violation of the mandatory joinder rule was irrelevant.

Should review be granted under RAP 13.4(b)(1) to address the apparent conflict between this case and this Court’s holdings in Anderson and Russell?

2. In deciding this case, Division Two held that this Court’s ruling in Andress was so “unprecedented,” unexpected and extraordinary that the “ends of justice” exception to mandatory joinder authorized adding new charges when a conviction was vacated as a result. To reach this conclusion, the court relied on its decision in State v. Gamble, 137 Wn. App. 892, 902, 155 P.3d 962 (2007), and Division One’s decision in State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004), review granted, \_\_\_ Wn.2d \_\_\_ (motion for discretionary review, 77347-5). Division Two

did not address the fact that Ford had already spent 19 years in custody on the now dismissed felony murder conviction, more than the standard range sentence.

Should review be granted under RAP 13.4(b)(4) to address

- a) the scope of the “ends of justice” exception, an issue which needs further definition by this Court;
- b) whether that exception applies when the prosecution could have but chose not to charge in the alternative;
- c) whether vacation of a conviction under Andress should trigger the exception; and
- d) whether the “ends of justice” are served by allowing the state to add a new charge when the defendant has already served nearly 20 years in custody, more than the amount of time the Legislature deemed presumptively appropriate for the offense?

D. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Leron Ford was charged with and convicted of second-degree felony murder with assault as the predicate felony, and second-degree assault. CP 42-43. He was ordered to serve a 600 month exceptional sentence, and appealed, unsuccessfully. CP 44-45, 77-82, 90, 98-116, 119-20. A subsequent personal restraint petition was granted and the conviction for second-degree murder vacated based upon this Court’s

decisions in Andress, 147 Wn.2d at 616, and In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). CP 117-18.

After Ford was charged by Fourth Amended Information with intentional second-degree murder and second-degree assault, the parties agreed to a stipulated facts trial. CP 229-45.<sup>2</sup> The court found Ford guilty both of intentional second-degree murder and of first-degree manslaughter as a lesser included offense. CP 246-69.

Ford appealed and, on July 25, 2007, Division Two of the court of appeals affirmed. Opinion at 1-7. This Petition timely follows.

2. Overview of facts re: crime

The murder charge was based upon the death of T.F., Mr. Ford's two-year old daughter, in 1986, who died as a result of injuries apparently caused by beating. CP 1-4. The assault was based upon injuries caused by beating to S.F., who was three at the time. CP 1-4.

3. Facts re: adding the new charge

Initially, Ford was charged with and convicted of second-degree felony murder with assault as the predicate felony, and second-degree

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<sup>2</sup>The verbatim report of proceedings in this case consists of 12 volumes. The volume containing the proceedings of July 12, 2005, will be referred to as "1RP." The 11 volumes containing the proceedings of July 26, August 10, August 17, August 22, September 22, and October 6, 2005, and January 3, 4, 10, 11, and 12, 2006, will be referred to as "RP."



assault. CP 42-43. After the conviction was reversed in light of Andress and Hinton, the prosecution sought to file a second amended information which, *inter alia*, added a charge of intentional second-degree murder.

1RP 2-3. Over Ford's objection, the superior court allowed the filing and arraigned Ford on the new information. 1RP 3, 5-6. Later, the prosecution indicated it also intended to add aggravating factors in a new information. RP 6, 11.

The prosecution's argument was that the court should apply an "interest of justice exception" to mandatory joinder, based upon the dissent in Andress. RP 61-62. While admitting it could have also charged intentional second-degree murder as an alternative but had not done so, the prosecution argued that it should be permitted to now. RP 60-63. According to the prosecution, this Court's decision in Andress was so unanticipated and shocking that the "interest of justice" exception to mandatory joinder should apply. RP 60-64.

Ford questioned whether Andress was actually so surprising, given that virtually every other state does not permit conviction of felony murder based upon an underlying assault. RP 59-67.

After several hearings on the issue, the superior court first held

that, after Andress, “the trial. . . which Mr. Ford had in 1987, in essence, no longer exists.” RP 66. The judge also held that precluding the state from filing the new charge would “defeat the interest of justice” because the Andress decision “abandons an unbroken line of precedent,” and Andress was “certainly extraneous to the prosecution of Mr. Ford.” RP 66. The court conceded that “[i]t’s undisputed that the State had the option to charge intentional murder in 1986,” but found the prosecution had not “negligently” failed to file an intentional murder charge because it had charged based upon the “long-standing interpretation of our State’s criminal statutes.” RP 67. The court was also persuaded there were no lesser included offenses, despite Ford’s argument that second-degree assault or attempted second-degree assault qualified. RP 67-78.

The prosecution then filed a Third Amended Information, alleging several aggravating circumstances for the murder and stating an intent to seek an exceptional sentence, despite defense objection. CP 223-24; RP 36, 138, 139-40, 143. After some preliminary proceedings for jury selection, the parties agreed to proceed on stipulated facts while preserving the issue of mandatory joinder. RP 166-72, 191-230; CP 246-55.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

REVIEW SHOULD BE GRANTED TO ADDRESS THE SCOPE AND APPLICATION OF THE “ENDS OF JUSTICE” EXCEPTION AND WHETHER THIS COURT’S ANDRESS DECISION JUSTIFIES ADDING A NEW CHARGE NEARLY 20 YEARS AFTER CONVICTION

Review should be granted in this case under RAP 13.4(b)(1) and (4), because of the apparent conflicts between the decision in this case and the decisions of this Court, and because this case presents issues of significant public interest and impact, on which this Court should rule.

1. Facts relating to court of appeals decision

On remand, the superior court allowed the prosecution to add the new charge of intentional second-degree murder despite the mandatory joinder rule, based upon two theories. First, the court held that there was no impropriety in adding the new charge because the decision in Andress effectively erased the entire prior proceedings and made it so the first charges “essentially” never existed and was void. RP 66. In addition, the court found that the “ends of justice” exception to mandatory joinder applied. RP 66.

On review, Division Two noted, but did not address, the trial court’s belief that Andress acted as an eraser and rendered void all prior

proceedings. Appendix A at 3-5. Division Two held that the offenses were “related” under the mandatory joinder rule, because they arose out of the same conduct. Appendix A at 5. The court also noted this Court’s holdings in Anderson and Russell but said that those cases were irrelevant because they did not address the “ends of justice” exception to mandatory joinder. Appendix A at 5-6.

Division Two then found its decision was controlled by Gamble, supra, which followed Division One’s decision in Ramos, supra. Appendix A at 6. More specifically, the court declared there was “no reason” for the prosecution to have filed additional charges against Ford in 1986 and that the prosecution “could not have foreseen the drastic change in the law the Andress would create,” so the “ends of justice” exception to mandatory joinder applied. Appendix A at 6-7.

2. Division Two erred and this Court should grant review

First, review should be granted based on the conflicts with this Court’s decisions in Anderson, supra, and Russell, supra. In Anderson, after this Court struck down a conviction for first-degree murder based upon acting with “extreme indifference to human life,” the prosecution, on remand, added a new charge of intentional first-degree murder. 96 Wn.2d

at 740. On review, this Court found that the fact that the initial charge had been found improper as a matter of law did not mean that the prosecution was free to charge a new crime which was not a “lesser included.” 96 Wn.2d at 740.

Here, just as in Anderson, this Court decided, as a matter of law, that assault did not apply as a predicate felony for purposes of convictions for felony murder under former RCW 9A.32.050(1)(b)(1975). Just as in Anderson, the new charge was not a lesser included but instead a new, uncharged means of committing the crime. And just as in Anderson, the result should have been the dismissal of the new charge. Further, under Russell, supra, the prosecution’s motive for adding the charges was irrelevant to whether mandatory joinder applied. 101 Wn.2d at 353.

In reaching its conclusion and refusing to follow Anderson and Russell, Division Two relied on its decision in Gamble, supra, and its belief that there was “no reason” for the state to have charged Ford in the alternative and that it “could not have foreseen the drastic change in the law that Andress would create.” Appendix A at 6-7. Division Two also relied on Division One’s decision in Ramos, supra, for the same proposition. Appendix A at 6. Division Two concluded that the

prosecution should be allowed to “seek full redress for Ford’s cruel and intentional killing” of his daughter by filing new charges. Appendix A at 6-7.

But if that reasoning was correct, this Court’s decision in Anderson would have been far different. Anderson involved the brutal death of a two-year old who had previously been treated for fractures of her clavicle and left leg and had second and third-degree burns over about 60% of her body before she died. State v. Anderson, 92 Wn.2d 176, 616 P.2d 612 (1980). This Court nevertheless held to the mandates of the mandatory joinder rule.

Further, the propriety of the ruling in Ramos is in question, as this Court has granted review in that case but not yet issued its decision. See Ramos, 77347-5 (scheduled for oral argument in September of 2007). Gamble is also pending review, although review has not yet been granted. See Gamble, 80131-2 (scheduled for consideration of the petition in this Court on February 5, 2008).

Review should be granted under RAP 13.4(b)(1) to address the conflicts between this case and Anderson and Russell.

Review should also be granted under RAP 13.4(b)(4), because this

case presents issues of serious public import upon which this Court should rule. This Court has already accepted review in Ramos, supra, on a similar issue.<sup>3</sup> The Court has also accepted review in several other cases posing similar but not identical issues. See State v. Wright/Brown (consolidated under 78465-5) (issue: where defendants were charged with alternative means of committing murder but the jury was only instructed on felony murder later dismissed under Andress, can the alternative be “revived”)<sup>4</sup>; State v. Hall, 78658-5 (issue: was it proper to retry the defendant on manslaughter when the prosecution sought, over defense objection, vacation of a felony murder conviction under Andress).<sup>5</sup>

This Court’s decision to grant review in a number of other cases involving similar issues is a telling indicator of the public importance of

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<sup>3</sup>Ramos, 77347-5, has been consolidated with State v. Medina, 77360-2, and the Court’s statement of the issue for those cases is:

Whether defendants whose convictions for second degree felony murder were vacated under In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), may be recharged with first degree manslaughter without violating the mandatory joinder rule, CrR 4.3.1(b)(3), or double jeopardy principles

[Http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues).

<sup>4</sup>Summary taken from this Court’s statement of the issue at [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues).

<sup>5</sup>Summary taken from this Court’s statement of the issue at [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues).

the issues in this case. Further, to petitioner's knowledge, none of the cases in which this Court has granted review has addressed the "ends of justice" exception where, as here, the defendant had already served *more* than the amount the Legislature deemed presumptively appropriate, proportionate and just for commission of the offense. See, State v. Parker, 132 Wn.2d 182, 186-87, 937 P.2d 575 (1997) ("the presumptive standard range sentence is a legislative determination of the applicable punishment range for the crime as ordinarily committed").

This Court should grant review, either under RAP 13.4(b)(1) or RAP 13.4(b)(4), to address the important issues presented in this case.

F. CONCLUSION

For the foregoing reasons, this Court should accept review of the decision of Division Two of the court of appeals in this case

DATED this 18<sup>th</sup> day of August, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL


Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows:

To: Ms. Kathleen Proctor, Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

To: Mr. Leron Ford, c/o Union Gospel Mission, 1224 E. Trent Ave., P.O. Box 4066, Spokane, WA. 99220-0066.

DATED this 18<sup>th</sup> day of August, 2007.

  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

LERON FORD,

Appellant.

No. 34326-6-II

UNPUBLISHED OPINION

HUNT, J. — Leron Ford appeals his bench trial convictions for intentional second-degree murder<sup>1</sup> and first degree manslaughter.<sup>2</sup> He argues that the trial court violated the mandatory joinder rule, CrR 4.3.1(b)(3), when it allowed the State to try him for intentional second degree murder on remand after the trial court vacated his original jury trial felony-murder convictions based on the Supreme Court's nullification of felony murder with an assault predicate in *Andress*.<sup>3</sup> Holding that the "ends of justice" exception to the mandatory joinder rule applies, we affirm.

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<sup>1</sup> RCW 9A.32.050.

<sup>2</sup> Former RCW 9A.32.060 (1975).

<sup>3</sup> *In re Personal Restraint of Andress*, 147 Wn.2d 602, 604, 56 P.3d 981 (2002).

## FACTS

Ford married CF<sup>4</sup> in 1981. They had two children: SF, a girl born on February 11, 1983, and TF, a girl born on February 15, 1984. In 1986, following a history of child and spousal abuse, Ford beat his two-year-old daughter, TF, to death and assaulted his three-year-old daughter, SF.

### I. FIRST TRIAL

In 1986, the State charged and a jury convicted Ford of (1) felony murder predicated on second degree assault of TF and (2) second degree assault of SF. At sentencing, the trial court imposed exceptional sentences on both counts: 600 months for the felony murder and 120 months for the second degree assault, to run concurrently.

In 2002, our Supreme Court issued *In re Personal Restraint of Andress*, holding that felony murder could not be predicated on felony assault. 147 Wn.2d 602, 604, 56 P.3d 981 (2002). Ford filed a personal restraint petition (PRP) challenging the validity of his felony murder conviction in light of *Andress*.

We granted Ford's PRP and remanded the case to the trial court for further proceedings consistent with *Andress*. Ruling that under *Andress*, Ford had been incarcerated for a crime that did not exist, the trial court vacated Ford's felony murder conviction and sentence in 2005.

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<sup>4</sup> We use the victims' initials under our General Order 2006-1. ("[I]n all opinions, orders, and rulings this court shall use initials or pseudonyms in place of the juveniles' names and in place of the juveniles' parents' names.")

## II. NEW MURDER CHARGE AND STIPULATED RETRIAL

In 2005, the State charged Ford with intentional second degree murder, based on the acts leading to TF's death. Ford argued that the mandatory joinder rule precluded the State's filing this new charge, CrR 4.3.1(b)(3); because: (1) The new intentional murder charge was not a lesser included offense of the former felony murder charge, for which he had already faced jeopardy; (2) nor was manslaughter a lesser included offense of felony murder; and (3) therefore, the State could prosecute Ford for only second degree assault or attempted assault.

Over Ford's objection, the trial court: applied the "ends of justice" exception to the mandatory joinder rule, CrR 4.3.1(b)(3); denied Ford's motion to dismiss the intentional second degree murder charge; and allowed the State to proceed on charges of intentional second degree murder and the lesser included offense of manslaughter. The trial court concluded that the intentional murder charge was not a prohibited related charge because, under *Andress*, the initial felony murder, predicated on second degree assault, "essentially" never existed.<sup>5</sup> Subsequently, the State filed an amended information alleging aggravating circumstances and informing Ford of its intent to seek an exceptional sentence if he were convicted of intentional second degree murder.

With the advice of his counsel, Ford agreed to a bench trial on stipulated facts. Ford stipulated that the trial court had sufficient evidence to find him guilty beyond a reasonable

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<sup>5</sup> The trial court stated that disallowing the amendment would preclude the State from trying the defendant on any offense because the original charge was void, and there are no lesser included offenses to a void charge.

doubt of intentional second degree murder and the lesser included offense of first degree manslaughter.

As part of the stipulation, Ford also waived his right to appeal all except the mandatory joinder issue. The parties agreed that the trial court would impose a sentence on only the manslaughter charge if Ford won his appeal on the mandatory joinder issue; in return, the State agreed not to seek an exceptional sentence.

After considering the stipulated facts, the trial court found Ford guilty of intentional second degree murder and first degree manslaughter as a lesser included crime. The trial court sentenced Ford to a high end standard range sentence of 192 months, with credit for more than 230 months already served.

Ford appeals the trial court's allowing the State to charge him with intentional second degree murder, allegedly in violation of CrR 4.3.1(b)(3). He seeks reversal of this conviction.

#### ANALYSIS

Ford argues that the trial court (1) improperly applied the "ends of justice" exception to the mandatory joinder rule, CrR 4.3.1(b)(3), and (2) was "improperly swayed" by the State's argument that, if it could not prosecute Ford for second degree intentional murder, it could not prosecute him at all.<sup>6</sup>

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<sup>6</sup> Ford further notes that he has already served 19 years in custody, more than the standard range sentence for second degree murder. Because Ford's brief fails to assign error or adequately to address the merits of his additional claims, we need not consider them. RAP 10.3(a)(4). We further note that pursuing these claims on appeal would violate the terms of Ford's voluntary stipulation.

The State responds that we should affirm the trial court's application of the "ends of justice" exception, since the State could not reasonably anticipate our Supreme Court's *Andress* decision. *See Andress*, 147 Wn.2d at 604.<sup>7</sup> We agree.

#### I. MANDATORY JOINDER RULE

Generally, the criminal rules require the State to file any and all "related offenses" in one charging document. CrR 4.3(a), CrR 4.3.1. Under the mandatory joinder rule, two or more offenses must be joined if they are related. CrR 4.3.1(b)(3). Offenses are related if they are within the jurisdiction and venue of the same court and are based on the "same conduct." CrR 4.3.1(b)(1). "Same conduct" is conduct that involves a single criminal incident or episode. *State v. Lee*, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997). The consequences for failing to join related offenses are as follows:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a *related offense*. . . . The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, *the ends of justice* would be defeated if the motion were granted.

CrR 4.3.1(b)(3) (emphasis added).

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<sup>7</sup> Shortly after our Supreme Court's *Andress* decision, our state Legislature enacted RCW 9A.32.050(1)(b), clarifying that a person commits second degree felony murder when a death results during the commission of *any* felony, including assault. RCW 9A.32.050(1)(b). Almost two years after this legislative fix, our Supreme Court held that any defendant convicted of felony murder predicated on assault since 1976, but before the Legislature enacted RCW 9A.32.050(1)(b), could have his conviction vacated. *See In re Restraint of Hinton*, 152 Wn.2d 853, 858, 100 P.3d 801 (2004).

Courts have applied the mandatory joinder rule to prevent the State from adding a new alternative means of committing a crime after the defendant has been tried on a different alternative means. See e.g., *State v. Anderson*, 96 Wn.2d 739, 638 P.2d 1205, (*Anderson II*) cert. denied, 459 U.S. 842 (1982); *State v. Russell*, 101 Wn.2d 349, 678 P.2d 332 (1984). But these cases do not address the “ends of justice” exception to CrR 4.3.1(b)(3), which allows the State to try a defendant on a related offense, not filed before the first trial, where “the ends of justice would be defeated” if the trial court granted the defendant’s motion to dismiss the related offense. CrR 4.3.1(b)(3). The trial court applied this exception here, and we affirm.

After 25 years of law to the contrary, our Supreme Court held that under former RCW 9A.32.050,<sup>8</sup> a conviction of second degree felony murder could not be based on assault as the predicate felony. *Andress*, 147 Wn.2d at 604. As we recently noted,

In *State v. Ramos*, 124 Wn. App. 334, 101 P.3d 872 (2004), Division One of this court observed that the Supreme Court’s unprecedented ruling in *Andress* was such an extraordinary circumstance that the ends of justice would be defeated if defendants otherwise properly convicted of second degree felony murder were set free by operation of a court-created procedural rule requiring joinder of related offenses.

*State v. Gamble*, 137 Wn. App. 892, 902, 155 P.3d 962 (2007).

*Gamble*, which comports with Division One’s *Ramos* decision, is controlling here. The State originally charged Ford with second degree murder based solely on the felony-murder predicate-assault alternative. Similar to *Gamble*, there was no reason for the State to have filed an additional charge of second degree intentional murder against Ford based on the same facts.

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<sup>8</sup> Laws of 1975, 1st Ex. Sess., ch. 260 sec. 9.

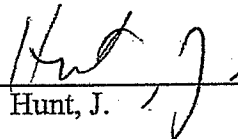
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In 1986, when the State filed its original charges against Ford, it could not have foreseen the drastic change in the law that *Andress* would create. *Gamble*, 137 Wn. App. at 902. Therefore, there was no reason for the State to charge Ford with intentional second degree murder in the alternative.

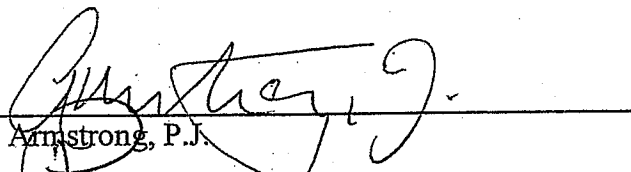
We hold that the trial court properly concluded that the "ends of justice" exception should allow the State to seek full redress for Ford's cruel and intentional killing of his two-year-old daughter, by filing a new information charging him with intentional second degree murder and the lesser included offense of manslaughter.

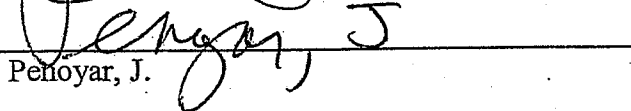
Finding *Gamble* dispositive, we affirm. *Gamble*, 137 Wn. App. 892.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
Hunt, J.

We concur:

  
Armstrong, P.J.

  
Penoyer, J.